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7 GOOGLE INC.

8 UNITED STATES DISTRICT COURT
9
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN JOSE DIVISION

12 RYAN CORLEY, et al., individuals,

13 Plaintiffs,

14 v.

15 GOOGLE INC., and DOES 1 through
16 200,000,

17 Defendants.

Case No. 5:16-cv-00473-LHK-PSG

**DEFENDANT GOOGLE INC.'S BRIEF IN
SUPPORT OF ADOPTION OF ITS
PROPOSED PROTECTIVE ORDER**

Judge: The Hon. Paul S. Grewal
Trial Date: Not yet set

1 **I. INTRODUCTION**

2 Over the past two weeks, both Plaintiffs and Google Inc. (“Google”) have spent significant
3 time and resources negotiating a stipulated protective order. After coming to a series of
4 compromises, the parties reached an agreement on all points except for two provisions. Google’s
5 proposal to resolve these two issues accommodates each party’s concerns, presents no prejudice to
6 Plaintiffs, and furthers one of the key purposes of any protective order—to safeguard the parties’
7 confidential and proprietary information. Accordingly, the Court should adopt Google’s Proposed
8 Protective Order, filed herewith.

9 **II. FACTUAL BACKGROUND**

10 On January 27, 2016, Plaintiffs filed a Complaint alleging that Google’s automated
11 processing of their Google Apps for Education (“GAFE”) email accounts violated the Electronic
12 Communications Privacy Act, 18 U.S.C. §§ 2510, *et seq.* (“ECPA”). (Dkt. 1.) Google anticipates
13 that discovery in this case will result in the production of proprietary, confidential, and sensitive
14 information regarding, among other things, its automated processing technology, disclosure of which
15 would pose a serious risk of competitive harm to Google. (Declaration of Karen L. Burhans
16 (“Burhans Declaration” or “Burhans Decl.”) ¶ 4.)

17 Judge Koh ordered the parties to file a proposed protective order for this Court’s signature by
18 May 4, 2016. (Dkt. 69, 79.) Thereafter, the parties exchanged drafts and engaged in lengthy meet
19 and confer discussions by phone and email. (Burhans Decl. ¶¶ 6-21.) Believing in good faith that
20 they could reach agreement on the proposed protective order, the parties filed two separate
21 stipulations, both granted by Judge Koh, permitting the parties additional time to reach agreement
22 without Court intervention. (*See* Dkt. 83, 87.)

23 The parties were able to reach substantial agreement in large part on the terms of a protective
24 order, with only two substantive issues remaining: first, whether the parties should be required to
25 disclose “Acknowledgements and Agreements to Be Bound” (“Acknowledgements”) executed by
26 third parties who receive “CONFIDENTIAL” information; and second, whether “Protected
27 Information” produced in this case could be used in other “related” cases. (Burhans Decl. ¶ 20.)
28 Google’s proposed language on these issues is set out in Exhibit B to the Burhans Declaration,

1 which shows Google's proposed changes to the last version sent by Plaintiffs' counsel. (*Id.* at ¶ 31.)

2 Judge Koh's May 9, 2016 Order stated that, if the parties could not reach agreement by May
3 11, 2016, each party should file a brief in support of their proposed protective order. (Dkt. 87.)

4 **III. ARGUMENT**

5 **A. Google's Need to Protect Its Confidential Information Outweighs Any Potential** 6 **Harm to Plaintiffs Arising from Disclosure of Acknowledgements.**

7 The primary point of contention between the parties is whether third parties required to
8 execute the Acknowledgement that they received information designated "CONFIDENTIAL" under
9 the protective order, should also be required to disclose those Acknowledgements—and,
10 accordingly, their identity—to the designating party.¹ (*See* Burhans Decl. Ex. B at § I.D.) Courts
11 have approved similar provisions requiring disclosure of executed Acknowledgements. *See, e.g.,*
12 *Apple Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846-LHK, 2012 WL 10817203, at *11 (N.D. Cal.
13 Jan. 30, 2012) (approving protective order requiring service of acknowledgements on all parties).

14 Google is entitled to know the identity of those individuals with access to its Protected
15 Information, for two principal reasons. First, disclosure of Acknowledgements is needed so Google
16 can enforce potential violations of the Protective Order. If Google were to discover that its Protected
17 Information produced in this case has been improperly disclosed, it needs to know who may have
18 been involved in the improper disclosure, in order to prevent further improper use of its information
19 and seek appropriate relief. Indeed, the entire purpose of an Acknowledgement is to ensure that
20 recipients of Protected Information abide by the Protective Order, yet that purpose is undermined if
21 recipients can unilaterally choose to hide their identities from Google (as Plaintiffs propose) and
22 preclude any effective means of enforcement.

23 Second, because Google is engaged in numerous cases at one time, with multiple opposing
24 experts and consultants, there is a heightened need for Google to know the identities of the
25 individuals who have access to its confidential information. For example, if an individual who

26 ¹ The parties agreed to disclose the identity of (and provide Acknowledgements for) those
27 individuals provided "CONFIDENTIAL-ATTORNEYS' EYES ONLY" ("AEO") information
28 (subject to Plaintiffs' ability to move the Court to prevent disclosure of the identity of an individual
provided AEO information), but could not reach agreement on the disclosure of Acknowledgements
for those individuals provided only "CONFIDENTIAL" information. (Burhans Decl. ¶ 20 n.1.)

receives Protected Information in this case were retained in another matter involving Google, that could create heightened risks that Google's information could be used improperly (for instance, a consultant in this matter could be retained in a subsequent matter by a Google competitor). Google should be entitled to identify these types of circumstances and seek relief where appropriate, but would be unable to do so without knowing the identities of the experts retained in this case.

Plaintiffs have indicated they oppose disclosure of these Acknowledgements for two reasons: first, disclosing the identity of individuals provided with "CONFIDENTIAL" information would intrude on Plaintiffs' trial strategy, and, second, requiring provision of such Acknowledgements to Google will impede Plaintiffs' ability to engage expert witnesses or consultants who may not want Google or others to know they were involved in a lawsuit against Google. (Burhans Decl. ¶ 22.)

Google's Proposed Compromise Resolves Plaintiffs' Trial Strategy Concerns. To resolve Plaintiffs' first concern, Google agreed to Plaintiffs' request that any Acknowledgements would be provided only *after* conclusion of the litigation, when there can be no possible concern regarding potential disclosure of Plaintiffs' trial strategy. (*See id.* at Ex. B § I.D.)

Google's Proposed Compromise Accommodates Plaintiffs' Expert Concerns. Plaintiffs have stated that this provision will hinder their ability to retain suitable experts. But Plaintiffs have provided no support for their fear, aside from their claim to have spoken to a few individuals who may have been reluctant to participate in the litigation if their identity were disclosed.² (*Id.* at ¶ 22.) Plaintiffs have given no indication that these experts would in fact refuse to work on the case and that their refusal is directly linked to the future disclosure of their name to Google at the end of the case.³ Nor is there any reason to believe that Plaintiffs will be unable to locate *other* suitable experts or consultants as a result of Google's proposed disclosure provision. Yet to accommodate Plaintiffs' concern—regardless of its validity—Google proposed a compromise such that, prior to disclosure of an Acknowledgement, the signatory would be given notice of the impending disclosure and an

² Nor can Plaintiffs show that this provision will actually have any meaningful effect as it will apply only to those few, if any, consultants or experts who are not also shown AEO information.

³ Plaintiffs expressed concern that academics could be wary of becoming involved in a case against Google, but, notably, in *In re Google Inc. Gmail Litigation*, No. 13-MD-02430-LHK (N.D. Cal. Mar. 18, 2014), plaintiffs' expert was a Johns Hopkins University professor.

1 opportunity to seek a protective order in a manner that would protect his or her identity from Google
 2 while the request for a protective order is resolved. (*See id.* at Ex. B § I.D.) Under Google’s
 3 proposal, Plaintiffs could also seek relief from the disclosure requirement.⁴ Thus, if unusual
 4 circumstances arise and there is a need to retain an individual who insists on anonymity for
 5 legitimate reasons, Plaintiffs can make that request to the Court.

6 Any burden to Plaintiffs from having to justify the need for anonymity is outweighed by
 7 Google’s actual need to understand the universe of individuals who have access to its confidential
 8 and proprietary business information, disclosure of which would result in competitive harm to
 9 Google. Because Google has proposed a compromise that accommodates both parties’ concerns, the
 10 Court should adopt Google’s proposed form of protective order.

11 **B. The Parties Agree in Principle to Use of Protected Information in “Related 12 Litigation.”**

13 In Plaintiffs’ last iteration of the protective order, they requested a revision to allow
 14 information produced in this case to be used in other “related” cases. (*See id.* at Ex. A § V.A.)
 15 Plaintiffs’ counsel is involved in another suit on behalf of GAFE users that Google has asked Judge
 16 Koh to relate to the instant case and, moreover, Google plans to move to sever all Plaintiffs’ claims
 17 in both suits, which could result in 855 individual suits concerning the same facts. (*Id.* at ¶¶ 23-30.)
 18 Google agrees that it is reasonable to allow Plaintiffs in these actions—but only these actions—to
 19 share discovery produced in this matter. Google therefore agrees to Plaintiffs’ request, albeit in a
 20 manner that appropriately limits use to these cases only, as set out in Google’s proposed protective
 21 order. (*See id.* at Ex. B p. 12 n.2.) This remedies both parties’ concerns.

22 **IV. CONCLUSION**

23 For the reasons above, the Court should approve Google’s proposed form of protective order.

24 _____
 25 ⁴ Plaintiffs refused Google’s proposed compromise, demanding that Acknowledgement signatories
 26 be allowed to unilaterally refuse to provide their identity without justification. Under Plaintiffs’
 27 formulation, if a signatory objected to disclosure of his or her Acknowledgement, it would be
 28 provided only to Google’s outside counsel and Google would need to move the Court for permission
 to view the Acknowledgement. (Burhans Decl. Ex. A § I.D.) This proposal does not alleviate
 Google’s concerns with respect to knowing who has access to its Protected Information because only
 Google’s outside counsel will know these individuals’ identities, and counsel is prohibited from even
 confirming or denying that a particular individual possessed Protected Information.

1 Dated: May 13, 2016

COOLEY LLP

2 /s/ Whitty Somvichian

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